UNDERSTANDING APPORTIONMENT, OVERLAP, DUPLICATION AND THE COMBINING OF SUCCESSIVE INDUSTRIAL INJURIES

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APPORTIONMENT GENERALLY

The employer is responsible only for that portion of an injured employee's disability caused by industrial injuries. The process by which the employer's responsibility is determined is called apportionment. Apportionment is the segregation of the residuals of the industrial injuries from those attributable to other industrial injuries, or to nonindustrial factors (see Hanna, California Law Of Employee Injuries & Workers' Compensation, Revised 2d Edition, Volume 1, § 8.05).

There are three types of apportionment under the current statutes. L.C. §4663 provides for apportionment to a naturally progressive disease process. L.C. §4750 provides for apportionment to a pre-existing disability. L.C. §4750.5 provides for apportionment to subsequently occurring, unrelated, noncompensable injuries.

When discussing apportionment, the three Labor Code sections must be kept separate. Rules regarding apportionment are different, depending upon which of the three code sections is used. In an individual case, one or more of the sections may be applicable.

To determine if there is valid apportionment pursuant to L.C. §4750 and L.C. §4750.5, a determination must be made as to whether or not a pre-existing disability or a subsequently occurring disability overlaps the current disability in question.

If a disability is not apportioned in accordance with one or another of these three statutes and case law pertaining to each, there is no legally sufficient apportionment (*Martins v. WCAB, 60 CCC 1151).* In the *Martins* case, a waitress developed foot problems from working eight-hour shifts over a period of 26 years. The doctor apportioned disability between industrial and non-industrial weight-bearing. The court found that apportionment was not proper under either L.C. §4750 or L.C. §4663, so there was no legal basis for apportionment.

Apportionment of disability only applies to permanent disability benefits. Neither temporary disability indemnity, medical treatment, vocational rehabilitation, nor death benefits can be apportioned under the three statutes cited above*(Granado v. WCAB, 33 CCC 647).*

It is necessary to distinguish apportionment of permanent disability from apportionment of liability between defendants, which can be apportioned as to all the benefits. Apportionment of liability can apply to specific injuries, or cumulative trauma injuries, or a combination of both. (See L.C. §§3208.1, 3208.2, 5303 and 5500.5). Apportionment of liability between defendants is allowed because it does not reduce the benefit to the employee, but merely divides liability percentages among defendants. In apportioning liability among defendants, a determination must be made as to what portion of the employee's disability is caused by each industrial injury when there are multiple employers or insurers.

The burden of proof as to apportionment of disability is on the defendant *(Pullman-Kellogg v. WCAB, 45 CCC 170).*

In California, apportionment of permanent disability cannot be attributed to causation nor to pathology *(Franklin v. WCAB, 43 CCC 310).*

The Schedule for Rating Permanent Disabilities, April 1997, defines overlap as follows: "When factors of disability resulting from the current injury duplicate factors resulting from a different injury or condition, the disabilities are said to 'overlap'. Overlap occurs to the extent that the factors of disability resulting from the current injury do not reduce an injured worker's ability to compete in the open labor market beyond the disability resulting from the pre-existing injury(ies) and/or conditions(s).... Overlapping disability(ies) resulting from the prior injury or condition must be factored out of the current disability so the rating reflects only the residual disability caused by the current injury. Overlap may be total, partial or absent...." Disabilities do not overlap unless both impair the injured worker's ability to perform work in the same manner. (*Mercier v. WCAB, 41 CCC 205; California Workers Compensation Practice, 3d Edition, CEB §16.40).*

Apportionment can be applicable even where the injuries are to the same or to different parts of body. In *Fresno Unified School District v. WCAB (Humphrey),* 65 CCC 1232, 28 CWCR 317, the court found nothing in the statute limiting apportionment to instances where the later injury involves the same part of the body as the earlier injury.

Apportionment should be distinguished from duplication of factors of disability. Duplication may arise when one injury causes disability to multiple parts of the body. (For example, when the applicant falls injuring his back as well as his knee.) This is not an apportionment issue. Why? Because apportionment of disability only occurs when there is more than one injury to the same body part or to different parts of the body.

APPORTIONMENT UNDER LABOR CODE SECTION 4663

L.C. §4663 provides for apportionment to a disease process existing prior to the compensable injury. This section provides that in the case of an aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for that proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the industrial injury.

L.C. §4663 must be interpreted taking into consideration the principle that the employer takes the employee as he finds him at the time of hire. When a subsequent industrial injury lights up or aggravates a previously existing asymptomatic condition, then liability for any resulting disability is allowed, without apportionment *(Ballard v. WCAB, 36 CCC 34).*

The leading case on apportionment under L.C. §4663 is *Franklin v. WCAB, supra.* This case holds that there is apportionment under L.C. §4663 to a natural disease process provided there is sufficient medical evidence to show that the pre-existing disease condition would have become disabling, due to the natural progression of the disease process, regardless of any industrial injury.

The distinction between legal apportionment to a pre-existing disease process and non-legal apportionment to the lighting up of an asymptomatic disease process is a difficult one. Generally, if a specific incident causes a disease process to become symptomatic, this is a lighting up of an asymptomatic disease process which is not legally apportionable. Usually catastrophic events such as strokes or heart attacks involve the lighting up of an asymptomatic condition, and if found compensable, are not legally apportionable. There could be, however, legal apportionment where the disability is shown to result from an underlying disease process and not from a catastrophic event *(Franklin v. WCAB, supra).* Another situation is where the industrial exposure, when combined with the underlying non-

industrial disease process, causes a gradual onset of disability which may give rise to apportionment under L.C. § 4663.

To reiterate, the employer takes the employee as he finds him. There is no legal basis for apportionment because a healthy person would not have suffered an injury or disability. If the industrial injury lights up a pre-existing, asymptomatic condition, it is fully compensable even though the pre-existing condition increases disability or, absent pre-existing pathology, the injury may have not occurred at all *(Zemke v. WCAB, 33 CCC 358 and Pullman-Kellogg v. WCAB, supra).*

Apportionment under L.C. §4663 requires the following four elements:

1. There must be evidence of a progressive disease process that pre-existed the compensable injury.

2. There must be medical evidence that the progressive disease condition would have become disabling even absent the industrial injury.

3. There must be medical evidence that the underlying disease process would have become disabling at a definite ascertainable time.

4. All of the above must be based upon medical opinion that is legally sufficient and and reasonably medically probable.

The first element requires that there be an aggravation of a disease process existing prior to a compensable injury. Often doctors will apportion by stating that some portion of disability is due to industrial causes and some portion is due to non-industrial causes (i.e. lifting bending and stooping performed both on and off the job). This would be improper apportionment since there is no pre-existing disease process *(Martins v. WCAB, supra*). To establish legal apportionment the defendant must show that the applicant had some disease process existing prior to the compensable injury. This must be shown by competent and sufficient medical evidence. If the disease process developed concurrently with the industrial injury, there would be no apportionment under L.C. §4663. For example, if the employee worked for 26 years and developed disability concurrently as a result of both industrial exposure as well as a disease process, but the disease process did not pre-exist the compensable injury, there would be no basis for apportionment under L.C. §4663.

The second element requires that the disease process must have become symptomatic and disabling as a result of the natural progression of the disease process even absent the industrial injury *(Franklin v. WCAB, supra*). Because the reference here is to disability occurring after the industrial injury, it is irrelevant that the employee was asymptomatic prior to the industrial injury. There can be apportionment to a natural disease process as long as that process pre-existed the industrial injury, even though the condition was asymptomatic at the time of the industrial injury. There must be substantial medical evidence that the condition would have become disabling, even absent the industrial injury as a result of the natural progression of the pre-existing condition *(Connors v. WCAB, 42 CCC 67)* . Inquiry must be made whether the employee would have become symptomatic and disabled as a result of the pre-existing disease process, even in the absence of an industrial injury.

The third element requires that the disability must occur at a definite, ascertainable time. This requires the opinion of a medical expert. If a doctor states that the employee would have developed disability at some time, but he cannot give an exact time, the opinion is considered speculative and is not a basis for legal apportionment. A reading of the cases

indicates that the physician must be able to state that the employee would have developed disability absent any industrial injury at the same time that he developed disability as a result of an industrial injury, or no later than the time the employee reached a permanent and stationary ratable stage *(Duthie v. WCAB, 43 CCC 1214).* In *Duthie* the court wrote: "The pre-existing disease need not be symptomatic and disabling at the time of the industrial injury, so long as it has manifested itself by the time claimant's permanent disability has reached a stationary ratable stage; however, a projection that, but for the industrial aggravation, disability would have occurred anyway at some indefinite future time, is not enough to support the apportionment of disability." If the physician cannot conclude that the disability would have manifested itself at the time of the industrial injury, or no later than the time of the permanent and stationary date, the apportionment is invalid.

The fourth element requires that the physician's report be based upon reasonable medical probability and not on speculation, guess or surmise *(Zemke v. WCAB, supra).*

If the physician cannot state all four elements with reasonable medical probability, then there is no legal apportionment. The physician's report and testimony, when considered as a whole, must demonstrate, based upon reasonable medical probability, that there is a legal basis for apportionment *(Gay v. WCAB, 44 CCC 817)* .

Because the defendant has the burden of proof on the issue of apportionment, failure to establish any one of the four elements will result in apportionment being invalid. In *Gay v. WCAB, supra,*, the court stated that it knew it would be a formidable task for a physician to state precise figures on apportionment. The court also stated that physicians often have to make conclusions when faced with difficult legal interpretations and conflicting factual situations. However, the opinion of the physician on apportionment must still be based on reasonable medical probability and meet all the four requirements in order for apportion-meant to be legal.

APPORTIONMENT UNDER LABOR CODE SECTION 4750

L.C. §4750 provides that an employee who suffers from a previous permanent disability or physical impairment and who sustains a subsequent injury shall not receive from the employer compensation for his pre-existing permanent disability or impairment. The employer is liable only for that portion of disability caused by industrial injury.

Under L.C. §4750 the apportionment must be to an actual disability pre-existing the industrial injury. Again apportionment to causes or to pathology is not legal apportionment *(Gay v. WCAB, supra).*

Since the employer has the burden of proof, he must show that prior to the compensable injury, the employee already had a disability when attempting to compete in the open labor market, or an impairment of earning capacity, or an impairment of the use of a member. This can be shown by evidence of a prior finding or award or by other evidence that disability actually existed prior to the industrial injury.

In *Gay* the court wrote as follows: "In order for the Board to rely upon a physician's evaluation as to apportionment under section 4750, the physician must disclose adequate familiarity with the preexisting disability. That is, the physician must describe in detail the exact nature of the preexisting disability and the basis for such an opinion in order for the Board to be able to determine that the physician properly apportioned under correct legal principles."

When considering apportionment under L.C. §4663, whether the employee was asymptomatic is irrelevant. On the other hand, L.C. §4750 requires that the employee have an actual disability pre-existing the industrial injury. Here the issue of whether or not the employee was symptomatic is very important. If the employee was symptomatic prior to the industrial injury, it may show that he had disability pre-existing. If the employee was not experiencing prior symptomatology, that could demonstrate that he had no disability pre-existing the industrial injury. Remember that the disability to be proved is one that would have been a ratable disability had it been an industrial injury. For example, if the employee had intermittent minimal pain as a result of a non-industrial automobile accident before the compensable injury, there would be no apportionment because intermittent minimal pain is not a ratable disability in a workers' compensation setting. But if the employer can show that the reason the employee was previously asymptomatic is that he worked in a congenial environment, then apportionment under L.C. §4750 may be proper. Another example would be an employee with a prior workers' compensation award for an old injury which resulted in a work restriction of no heavy work. If he was asymptomatic prior to the industrial injury, that may be evidence that there is no prior disability. However, if the employer can show that the employee continued to observe his work restrictions, and that the reason he was asymptomatic was that he continued to work in an environment congenial with his restrictions, apportionment could be proper *(Callahan v. WCAB, 43 CCC 1907).*

To apportion under L.C. §4750, there must be an event or condition that led to disability which pre-existed the industrial injury. That condition or event could be a prior industrial injury, a non-industrial accident, a disease, or a situation in which the employee merely developed pain, atrophy, limitation of range of motion, or loss of visual or hearing acuity. It is possible that the employee suffered from a congenital defect which caused disability. Once the determination is made that there was some event or condition that existed prior to the industrial injury, the defendant must then show that this event or condition was actually disabling immediately prior to the compensable injury.

Pre-existing disability can be established by proving that the employee was receiving medical treatment for the condition or event prior to the industrial injury. Medical records showing that the employee had consulted a doctor and complained of pain is evidence of pre-existing disability. Evidence that the employee missed time from work prior to the industrial injury due to pain or discomfort in the same part of the body alleged as the industrial injury, demonstrates pre-existing disability. Testimony from the employer that the employee complained of pain following a day's work is evidence of pre-existing disability.

Pre-existing disability cannot be established by imposing a retroactive, prophylactic work restriction due to a pre-existing condition after a subsequent industrial injury occurs, unless the worker was actually restricted in his work activity prior to the industrial injury *(Franklin v. WCAB, supra; Amico v. WCAB, 39 CCC 845).* However, where the injured worker was actually under a prophylactic restriction for a pre-existing condition or event at the time the subsequent industrial injury occurs, apportionment to pre-existing disability is proper. It is only the retroactive application of a prophylactic restriction to an otherwise non-existent previous disability that is prohibited *(Bookout v. WCAB, 41 CCC 595).*

There can be objective evidence of a pre-existing disability, such as an amputation, or that the employee restricted his activities. For example, this evidence might be in the form of testimony from the employer that the employee stated he had back problems and would not do certain types of lifting or lift certain weight. This could be valid evidence of a pre-existing disability. The question to be determined by the trier of fact is, prior to the industrial injury, was the employee suffering from a disability of such a nature that a

workers' compensation permanent disability award would have been given for that disability? As can be seen, the definition of a pre-existing, permanent disability is the same as that for permanent disability for rating purposes. The disability that pre-existed the injury must be a disability which causes an impairment of earning capacity, impairment of normal use of a member, or a competitive handicap on the open labor market *(Luchini v. WCAB, 35 CCC 397).*

Once the defendant has proved that there was some event or condition and that event or condition resulted in disability to compete in the open labor market, he has met his burden of proof on apportionment. However, at this point it does not necessarily follow that the defendant will prevail. The issue under L.C. §4750 is whether the employee had any disability immediately prior to the compensable injury. The issue is not whether the employee had disability at some previous time in his life. The employee must have disability immediately prior to the industrial injury. If the employee can show that, in fact, he had recovered from whatever disability was caused by the pre-existing injury or condition and had no disability just prior to the industrial injury, there is no basis for apportionment. This concept, under L.C. §4750, is called rehabilitation from disability.

Rehabilitation from disability can be either total or partial. An employee may have partially recovered from a prior injury or condition, or totally recovered. If the employee totally recovered, there is no apportionment. For example, if the defendant presents evidence that the employee had a back injury from a prior workers' compensation case and received a 25 percent award based on a restriction of no heavy lifting, repeated bending and stooping, the defendant has met his burden of proof on the issue of apportionment. However, the employee can then present evidence that he rehabilitated himself from the prior injury or disability. The question is, whether between the time of the injury or condition that caused the pre-existing disability and the subsequent compensable injury, did the employee recover from the pre-existing event or condition that caused disability? Many who have injuries, both industrial and non-industrial, fully recover. This is a question of fact, and the employee has the burden of producing evidence in rebuttal on this issue, once the defendant has met its burden of proof in establishing pre-existing disability.

To determine if there has been rehabilitation from disability, the events that occurred between the subsequent compensable injury and the prior event that led to the pre-existing disability should be examined. What period of time has elapsed between the two injuries? Was there any medical treatment between the two injuries? Did the employee miss any time from work between the two injuries? Is there any evidence that the employee was suffering pain between the two injuries? Was the employee given a work restriction that he continued to observe? Was the employee given a work restriction and did he live a congenial lifestyle? What type of injury or condition pre-existed the industrial injury? It is easier to prove that he recovered from a soft tissue injury than it is from back surgery. If it is shown that the employee fully recovered prior to the compensable injury, then total rehabilitation from disability may be anticipated, and the employee is entitled to an unapportioned award. If the employee has partially recovered, then the apportioned disability may be less than would have been given at the time the original injury or condition first developed.

The leading case on rehabilitation from disability is *Robinson v. WCAB, 46 CCC 78.* In this case the employee sustained an injury in 1965 while working as a warehouseman. He underwent back surgery and received a 32 percent permanent disability award. In 1966, he was returned to light duty. In 1968, he returned to work as a warehouse foreman. He then continued to work as a warehouse foreman for ten years, when he suffered a second industrial injury. The court stated that a permanent disability is one which causes "impairment of earning capacity, impairment of normal use of a member, or a competitive

handicap in the labor market." The court went on to state that the previous condition to which apportionment is sought must actually be "labor disabling". The question in this case turned on whether the employee had rehabilitated himself from his prior industrial injury which occurred ten years before.

The court in *Robinson* stated that if an injured employee recovers, and is again injured, he is entitled to compensation for the injury based on his rehabilitated condition, not on his condition prior to the disability rehabilitation. The court went on to state, given all the facts, that the employee was entitled to an unapportioned award. The employee did rehabilitate from his disability. The court looked at the amount of time which had elapsed between the prior injury and the current injury, which was ten years. During that period, the employee returned to work without restriction. The evidence showed that the employee sought no medical treatment and missed no time from work. The employee did not restrict his activities. Therefore, the court concluded that just prior to the industrial injury, the employee was suffering no disability to compete on the open labor market and there was no basis for apportionment under L.C. §4750.

Remember that rehabilitation from disability is not automatic. The employee has the burden of proving by substantial evidence that he rehabilitated himself from the disability even though the defendant may otherwise have a legally valid basis for apportionment.

In taking into account whether an employee has been rehabilitated from his disability, one must look at the concept of congenial job. One must differentiate disability rehabilitation from a congenial job and congenial lifestyle. A congenial job and lifestyle is one in which the employee lives consistent with the restriction given him by the physician and has the disability, but does not develop any further problems because he observes his physician's orders. An illustration is the employee who is given a work restriction. He is told that if he observes the restriction, he would have no problems. He then observes that restriction. The question becomes whether the employee who now appears to have no disability, in fact, has no disability because he has been rehabilitated; or does have disability, but it is quiescent because of a congenial job and lifestyle. In the *Robinson* case it is stated that if the employee consistently leads a congenial lifestyle, it might be that he has not been rehabilitated, but has no patent problem because he observes his physician's orders. Again, in *Robinson*, the employee returned to light duty for a short period of time, but then returned to duty exceeding his work restriction for ten years. If he had continued to observe the work restriction, it would have been harder to prove disability rehabilitation because it can be argued that the reason he did not seek medical treatment and suffered no pain is that he complied with his physician's orders and restrictions.

Apportionment, under L.C. §4750, must be based on medical evidence to support an award. Such evidence must be substantial and based upon reasonable medical probability.

APPORTIONMENT UNDER LABOR CODE SECTION 4750.5

L.C. §4750.5 provides as follows:

> "An employee who has sustained a compensable injury and who subsequently sustains an unrelated noncompensable injury, shall not receive permanent disability indemnity for any permanent disability caused solely by the subsequent noncompensable injury."

Under L.C. §4750.5 there is an issue of apportionment when the employee sustains an industrial injury and thereafter sustains an unrelated, noncompensable injury. If the

unrelated subsequent noncompensable injury causes an increase in permanent disability, the employer will not be liable for that increase.

The purpose of this section is to overrule the decision of the court in *Jensen v. WCAB, 47 CCC 1138,* which ruled that there can be no apportionment to subsequent noncompensable injuries because these injuries do not come under the purview of L.C. §§4663 or 4750.

To establish apportionment under L.C. §4750.5, one must prove the following four elements:

1. The subsequent incident is unrelated to the original industrial injury;

2. The subsequent injury is a noncompensable injury;

3. The permanent disability was not solely caused by the subsequent noncompensable injury;

4. The subsequent injury actually increases the disability. If the subsequent injury does not permanently increase the permanent disability, there is be no basis for apportionment.

Under L.C. §4750.5, the defendant has the burden of showing that the unrelated non-compensable injury causes an increase in permanent disability.

With reference to L.C. §4750.5 "subsequent" means occurring later in time than the industrial injury which is subject to rating (*Ashley v. WCAB*, 60 CCC 683).

"Unrelated" means that the second injury was not proximately caused by the first. This definition is based on a line of cases holding that when an industrial injury has caused a subsequent injury, the second injury is considered to be an industrial injury because it is a compensable consequence of the first industrial injury. An example of this occurs when the employee injures his left knee and has knee surgery. Later, while walking at home, and as a result of the weakness in the left knee due to the surgery, the left knee buckles and the employee falls, injuring the right knee. The second fall, having been caused by the weakness from the compensable injury, becomes a compensable consequence and therefore is not subject to apportionment under L.C. §4750.5. However, where the subsequent incident is totally independent of the industrial injury, then apportionment is proper *(Fisk v. WCAB, 58 CCC 732)* .

"Noncompensable injury" came up in the case of *Ashley v. WCAB, supra.* The physician in *Ashley* apportioned to a subsequently occurring pregnancy and a prior period of unemployment. The court held the apportionment invalid, as it was not due to a subsequent noncompensable injury. The court ruled that L.C. §4750.5 does not allow apportionment to subsequent conditions or situations. The court wrote as follows: "Subsequent obviously means later in time than the injury to be rated and injury means hurt, damaged, or harmed". Noncompensable is best described by reference to compensable as discussed in *Livitsanos v. Superior Court, 57 CCC 355*. A compensable injury is one that causes occupational disability or death. L.C. §3208.1, in combination with relevant case law, describes specific and cumulative injuries as incidents or exposures that cause disability or need for medical treatment.

The court in *Ashley* went on to state as follows: "We conclude that the key distinction the legislature intended to make in L.C. §4750.5 was between compensable and noncompensable injuries, rather than expanding the ordinary meaning of 'injuries' to

include a vast array of conditions and circumstances not usually relevant in apportionment. If the legislature intended to include 'conditions', it would have said so. We are persuaded the legislature merely intended that apportionment would apply only to noncompensable injuries, that is, those clearly not occupationally related. This careful distinction reflected legislative awareness of the case law which does provide for compensability for subsequent injuries where the first injury is a substantial factor in causing the second, noncompensable injury...beyond this, it did not go." The court went on to disallow apportionment to the pregnancy and the period of unemployment because, by definition, they are not injuries.

The court has further defined what is meant by the term "unrelated noncompensable injury". In the case of *Fresno Unified School District v. WCAB* (Humphrey), *supra* the applicant filed claims for injury to his neck, spine, left shoulder, and both upper extremities as a result of a continuous trauma injury ending August 20, 1997, and a specific injury to his back on August 19, 1997. On August 21, 1997, he suffered a non-industrial heart attack. He had no prior cardiac symptoms and no restrictions, but the heart attack independently caused total disability. The WCJ awarded 71 percent permanent disability, without apportionment, on the basis that the heart attack was a condition and not an injury. The Court of Appeal indicated that the WCJ was incorrect in this conclusion. The court stated the term "unrelated noncompensable injury", as used in L.C. §4750.5, was addressed in the *Ashley v. WCAB, supra*, which involved a pregnancy after noncompensable injuries. The court held that the term meant an injury that was not industrial related, based on the concept that a noncompensable injury may be defined by reference to what is considered a compensable injury. A compensable injury is one that causes disability or need for medical treatment. In the opinion of the court in *Ashley*, that distinction eliminates the vast array of conditions and circumstances not usually relevant in apportionment. Here the court indicated that "unrelated noncompensable injury" means a disabling event which, had it been work-related, would be compensable under the compensation laws. Though caused by a "condition", to wit, a cardiovascular disease process, a heart attack is an "injury" for purposes of L.C. §4750.5.

The court next dealt with the meaning of the word "solely" in the phrase "solely by the subsequent noncompensable injury". The defendant argued that all the disability should have been apportioned to the subsequent heart attack because the disability was caused solely by the subsequent noncompensable injury. The court stated the paramount purpose of the workers' compensation law is to provide benefits for work-related injuries, and it is presumed that the legislature acted consistent with this principle. In the opinion of court, "solely" invites a comparison between the successive injuries and disabilities, a procedure that traditionally has been regular fare for the compensation bar and judges. Apportionment between prior injuries and later natural disease processes has been dealt with for decades, as has the process of apportioning between employers. The court indicated the same principle should govern in this situation. The basic rule has always been that, to the extent an old and a new related or connected disability overlap, there is no new disability to be compensated. Therefore, to determine the permanent disability rating where one or more successive related compensable injuries exist, the disability rating of the earlier injury is subtracted from the disability rating of the later injury. The product of this arithmetic sets the disability rating for the later injury. For example, if the workers' first industrial injury resulted in a 60 percent permanent disability and his or her second industrial injury resulted in 100 percent disability, the last disability must be rated at 40 percent. If the earlier injury resulted in 100 percent disability, the later injury would not result in any further disability. The court stated history exists which supports the conclusion the legislature wanted the statute to apply prevailing rules about apportionment to both pre-existing and subsequent disabilities. The WCJ rated applicant's permanent disability from his orthopedic injuries at 71 percent. Thus, even if his rating for the heart attack is 100 percent, only 29 percent can be deemed to be solely from the heart attack and noncompensable. The court pointed out that even if the

applicant had never had the heart attack, he would have been partially disabled due to his orthopedic injuries. The 71 percent permanent disability was not solely due to the cardiac injury, therefore he is entitled to be compensated for it. While the WCJ's result was correct, his reasoning was not.

CALCULATION OF APPORTIONMENT

Once the physician has established proper apportionment under L.C. §§4750, 4750.5 or 4663, there are two methods of calculation: the percentage method and the subtraction method.

Using the percentage method, the physician assigns specific proportions of disability to industrial causes and to non-industrial causes or unrelated causes. For example, the physician can state, "I apportion 50% of the disability to industrial causes and 50% of the disability to the natural progression of the underlying condition".

Using the subtraction method, the physician describes the overall level of disability to all causes and then assigns a lesser disability to pre-existing causes. For example the physician can state, "The employee's present overall disability is a limitation to light work and, absent the industrial injury, as a result of a natural progression of his pre-existing disease process, the employee would have a disability precluding heavy work".

In *Gay v. WCAB, supra,* the court held, due to the formidable task of a physician to state precise figures on apportionment, it is permissible for a physician, under L.C. §4663, to state his opinion on apportionment in terms of a reasonable, medically probable range. The physician, however, must state in his report the reasons for his opinion and the facts he relied on in determining the range of disability. Then the Appeals Board, after determining the facts from the conflicting evidence, can determine the issue of apportionment based on that range reflected in the record.

DISTINGUISHING APPORTIONMENT (OVERLAP) FROM DUPLICATION - INJURIES TO DIFFERENT BODY PARTS

Duplication may arise when ***one*** industrial injury causes disability to multiple parts of the body. The Schedule For Rating Permanent Disabilities, April 1997, states that combining multiple factors of disability from a single injury may result in duplication. For example, this would occur when you have an employee falling and injuring his back and knee. In his report the physician precludes the employee from heavy work as a result of the back injury and also precludes him from heavy work as a result of the knee injury. Duplication works on the theory that when a single injury causes disability to multiple parts of the body and the different factors of disability do not further reduce an injured worker's ability to compete in the open labor market beyond a single factor standing alone, they are duplicating and the employee should not receive payment for both disabilities.

Duplication must be distinguished from apportionment. Successive injuries to different parts of the body causing similar disabilities, results in an apportionment issue under L.C. §4750 and are said to overlap. As an example, this would occur when an employee has a back injury in 1994, resulting in a preclusion from heavy work and then, in 1996, has a knee injury resulting in a preclusion from heavy work. This is an apportionment issue under L.C. §4750 because the employee has a pre-existing disability, albeit to another part of body.

See the Schedule For Rating Permanent Disabilities, April 1997, at pages 1-9, 1-10 and 1-11, which defines and discusses the concepts of duplication and overlap.

SINGLE INJURY CAUSING DISABILITY TO MULTIPLE PARTS OF THE BODY (DUPLICATION)

In the case of a single injury causing disability to multiple parts of the body, the question is whether there are duplicating factors of disability. In the case of *Hegglin v. WCAB, 36 CCC 93, (the Hegglin holding was rejected in the cases of Mihesuah and Morgan, see below),* the injured worker fell, injuring his back, and as a result of the back surgery, he developed hepatitis. For the back disability, the employee was given a restriction of no heavy lifting and for the hepatitis a restriction of no heavy lifting after several hours of exertion. The court in *Hegglin* ruled that the way to apply duplication was for the disability evaluator* to put each of the disabilities through the Multiple Disabilities Table (MDT). In *Hegglin* the court ruled that this situation did not involve apportionment under L.C. §4750 because there was no pre-existing disability, and therefore both disabilities should be checked against the MDT, and the table takes duplication into account. Under the *Hegglin* rationale, the permanent disability specialist is to rate out both 30 percent standards if the disability is no heavy work for the back and no heavy work for the knee, then combine them on the MDT. This would result in a greater disability for the employee than if one of the work restrictions is eliminated because it is duplicative.

In the case of *Mihesuah v. WCAB, 41 CCC 181,* the employee was given a chest disability of light work and a left knee disability of semi-sedentary as a result of a specific injury. The 50 percent standard disability for the chest would have adjusted to 56 percent and the 60 percent standard disability for the knee would have adjusted to 69 percent. Running the two disabilities through the MDT would give a rating of 92 percent if the theory of the *Hegglin* case was applied. In this case, however, the disability evaluator gave a 70 percent standard. The disability evaluator* gave a 60 percent standard for the knee and a ten-percent add-on for the chest, considering the rest to be duplicating factors of disability. The question is, which was the correct rating and did the disability evaluator under *Hegglin* have to use the MDT? The court ruled "no" that the MDT was only a guide and the disability evaluator could rely on his expertise in considering duplication. The court, therefore, agreed with the 70 percent standard.

In the case of *Morgan v. WCAB, 43 CCC 1116,* the employee, as a result of one injury, had a light work restriction for a hernia and a light work and no emotional stress restriction for hypertension. The disability evaluator gave a 50 percent standard for the hernia, but only a 20 percent standard for the hypertension because of duplication. The employee objected. The disability evaluator testified that the 50 percent standards for the hernia and the hypertension duplicated and therefore the disability evaluator gave only a 20 percent standard for the hypertension. The disability evaluator further testified that the MDT does not take into account overlap. *Morgan* argued that *Hegglin* should apply and the court should have run a 50 percent standard and a 60 percent standard through the MDT, which would then result in 96 percent disability. The court in *Morgan* reversed and remanded the matter back to the Appeals Board for taking further evidence. In *Morgan,* the court ruled that the disability evaluator need not use the MDT. The court, in *Morgan,* said that the Board must fully describe all the factors of disability and then the disability evaluator, taking into account the entire picture, must decide whether to consider duplication or just use the MDT. According to *Morgan* , the judge puts all the factors of disability into the

* Disability evaluator refers to a disability rater employed by the Disability Evaluation Unit of the Division of Workers' Compensation. Previously they were known as disability evaluation specialists and raters.

rating instructions and the disability evaluator then analyzes the case to determine if the employee's factors of disability duplicate. If they do not, the MDT will be applied, and if they do then the MDT will be applied only after taking into account duplication.

Under current case law as well as the definitions set forth in the Schedule For Rating Permanent Disabilities, April 1997, it is the trial judge who should delineate all factors of disability when considering multiple disabilities from a single injury. It is the disability evaluator who then determines if some or all factors of disability are the same or different. If the factors of disability are the same, there is duplication. If the factors are different, no duplication exists and the standard ratings will be put through the MDT. If some factors of disability are duplicative and some factors are not, the disability evaluator will eliminate the duplicating factors of disability and then run the remaining factors through the MDT. Disability evaluators believe that the MDT does not take into account duplication, but only pyramiding. Pyramiding occurs when an unrealistically high rating is obtained when adding ratings of individual body parts. There is no indication that the MDT was ever intended to include a provision for duplication as set forth in *Hegglin.* It would, therefore, appear that the correct method for handling duplication is for the trier of fact to outline all the factors of disability, then the disability evaluator determines duplication, if any, and then completes the rating using the MDT, if applicable. (If there is total duplication, do not use the MDT.)

In determining whether factors of disability are overlapping or duplicative, it must be determined whether the employee has a greater inability to compete in the open labor market as a result of the added disability. If the added disability does not decrease his ability to compete in the open labor market or further hamper his earning capacity, then there is total duplication and no entitlement to additional disability. This is a question for the trier of fact and the disability evaluator. The physician also plays an important role in duplication. It is up to the physician to outline the factors of disability for each part of the body injured.

Some applicant's attorneys argue that any time there is a no heavy work restriction for the back, and no heavy work restriction for the knee, the employee is entitled to both because it is a greater handicap to compete in the open labor market. Likewise, they argue that the *Hegglin* theory is correct. However, it appears at present that the majority of the cases and the Appeals Board follow the reasoning of *Morgan* and *Mihesuah ,* applying duplication before putting the standard ratings through MDT. As an example, if there is a no heavy work disability for the back and a no heavy work disability for the knee, these would be totally duplicating, and there would be only a 30 percent standard. However, the employee would be entitled to some increased disability for the objective and subjective factors of disability, which do not duplicate. For instance, if there is a no heavy work restriction for the knee and a no heavy work for the back and for the back a constant slight back pain, the employee will get a 30 percent standard for the knee and a ten percent standard for the back pain. However, if the employee has a constant slight pain becoming moderate on heavy work for the back and a no heavy work restriction for the knee, the constant slight pain in the back would not duplicate the no heavy work restriction, but the moderate pain on heavy work would be duplicative and would be not be applied. Again, the employee would only be entitled to an additional ten percent for the back.

Attorneys must be careful in determining overlap and duplication to determine if the factors of disability are, in fact, the same or different. The fact that the physician uses the same restriction does not necessarily mean they are the same. It might be that a disability of light work for hepatitis, as occurred in *Hegglin* , would not overlap a work restriction for the back because one is for lifting and the other is for weakness and fatigue and, therefore it could be argued that they are not duplicate factors of disability. Generally the rule applied by disability evaluators is that, if the work restrictions are the same, then they are duplicative.

It is up to the physician, in his report, to explain why the disabilities are different; otherwise the factors of disability will be found to be duplicative.

One should note that in most cases involving duplication, the duplication will be partial and not total. As can be seen in the *Mihesuah* case, the disability evaluator did allow an additional ten percent as disability that was not duplicative of the disability to the other part of body.

There may be situations in which there is total duplication, partial duplication, or no duplication at all. Whether duplication occurs will depend on the disability description used by the physician and the explanation by that physician. The workers' compensation judge will then lay out all the factors of disability and the disability evaluator will apply the concept of duplication before putting the matter through the MDT.

SUCCESSIVE INJURIES TO DIFFERENT PARTS OF THE BODY (LABOR CODE SECTION 4750 APPORTIONMENT)

If there are successive injuries to different parts of the body, this is a L.C. §4750 issue of apportionment and overlap. This situation amounts to an apportionment under L.C. §4750, since the employee would have a pre-existing disability. For example, if the employee has a prior disability of no heavy work for the knee as a result of an old industrial injury and now has a new no heavy work restriction for the back, the question would be: do you have overlap? It appears this would be a question of fact to be determined by the judge based on concepts of L.C. §4750 apportionment. There would be two issues. The first issue, as previously discussed above (see Apportionment Under Labor Code Section 4750), is whether the employee had a disability to compete in the open labor market as a result of the prior injury just before the subsequent injury. This would involve concepts of disability rehabilitation as discussed above. After the judge has determined whether there was a prior disability, he should determine if the factors of disability from the prior injury are the same, or different. He must then inquire as to whether the factors of disability from the two injuries or conditions overlap. If the factors are the same, overlap based upon apportionment would apply, and if they are different, overlap would not apply. The judge could also find partial overlap.

The leading case involving successive injuries is *Mercier v. WCAB, supra,* in which the employee had a 1970 injury to the back giving a restriction of no heavy lifting, repeated bending and stooping and then had a continuous trauma injury to the heart from 1949 to 1971 requiring an avoidance of severe emotional stress and a disability between light work and semi-sedentary. The judge rated for light work to semi-sedentary work with no emotional stress and subtracted the prior 34.5 percent award from the back disability. The judge gave an overall disability of 40.5 percent. The court ruled that the second injury can only be compensated to the extent it can be said that the employee's earning capacity, or ability to compete in the open labor market, is decreased. The proper procedure is to evaluate the disability prior to the second injury, then determine if the disability is greater as a result of the combined disabilities, or is the same. If it is the same, there is total overlap and no additional disability is awarded. There are situations where disabilities are totally the same, which is total overlap, or partially the same, which is partial overlap. If disability is increased, the employee is entitled to that increase caused by the second injury.

The court in *Mercier* went on to state that if successive injuries produced separate independent disabilities, each can be rated out at 100 percent. But if the second injury, even to a separate part of body, does not alter the earning capacity and ability to compete in the

open labor market, then there is no increase in compensation. There can be an increase in compensation only to the extent that the second injury alters the employee's ability to compete in the open labor market or his earning capacity. The court stated that the question of overlap is one of fact, which can be total or partial. The court went on to uphold the apportionment awarded by the Appeals Board as being proper.

If there are successive injuries causing disability, the judge must determine the factors of disability from each injury, then determine if they are the same, or different. This requires the judge to study the medical record in order to determine how the factors of disability manifest themselves. If they manifest themselves in the same way, then there would be no increased disability. If they are different, the employee would be entitled to a new award. An example is an employee who hurts his back and has a total inability to compete in the open labor market. Despite that he then goes back to work, at which time he is blinded in both eyes. The employee would be entitled to two 100 percent awards because blindness in both eyes and the back disability are totally separate and distinct disabilities and there would be no overlap. Applicant's attorneys sometimes argue that two identically described disabilities are more significant than either standing alone since they make it more difficult for a worker to compete in the open labor market, but the current status of the law appears contrary.

The other leading case on successive injuries is the case of *Hutchinson v. WCAB, 28 CCC 20.* In *Hutchinson* the employee sustained an industrial disability of 26 percent and subsequently had a second injury with 26 percent disability. Some of the factors of disability overlapped, although the two injuries were to different parts of the body. The second award was annulled, since the Board must consider whether the second injury further reduced the earning capacity or the ability of the employee to compete in the open labor market. The employee cannot be compensated twice, but can be compensated only for that portion of the disability that was increased by the second injury. The court went on to state that the way to compute this is to take the prior disability, then subtract it from the combined effects of both disabilities.

The key to identifying overlapping factors of disability is determining whether the disabilities are, in fact, overlapping or independent. This is a question of fact for the judge. There is some indication that these cases can go to the disability evaluator for expert opinion even in a L.C. §4750 successive injury case. However, since this would be a case of apportionment, it is generally up to the judge to make the decision. The judge can enlist the help of the disability evaluator by issuing rating instructions setting forth the current factors of disability as well as the prior factors, then asking the disability evaluator to apportion out the earlier injury.

Disabilities do not overlap unless both of them impair the worker's ability to perform work in the same manner. The existence of overlapping disabilities is a question of fact. (California Workers' Compensation Practice, *supra)*. The defendant has the burden of proof on this issue.

COMBINING SUCCESSIVE INDUSTRIAL INJURIES

Under the cases of *Wilkinson v. WCAB, 42 CCC 406* and *Bauer v. County of Los Angeles, 34 CCC 594,* when two industrial injuries to the ***same part of body*** become permanent and stationary on the same date, no L.C. §4750 apportionment applies and the disabilities are combined. Where there is a single permanent and stationary date for two or more injuries to the same part of body, a single overall permanent disability rating is given for all the

injuries. If different employers or insurers are involved in the successive injuries, liability for the permanent disability is apportioned among the defendants.

The *Wilkinson* rationale has been extended to combine any two or more injuries where there is a common part of body becoming permanent and stationary on the same date. The *Wilkinson* case involved a series of injuries to a single part of body. In *Norton v. WCAB, 45 CCC 1098*, one injury to the back and one to the gastrointestinal system and back were involved. Since both involved back injuries which became permanent and stationary at the same time, the injuries were combined, for rating purposes, into one injury, and no L.C. §4750 apportionment was applied.

The current state of the law is that, if there are two or more industrial injuries to a common part of the body that become permanent and stationary on the same date, no L.C. §4750 apportionment is applied, but they are combined for rating purposes. An example is where an employee sustains an injury to his back on January 1, 1998 and on March 20, 1998 sustains a second injury to the back. Later both back injuries become permanent and stationary on the same date. The employee is given a disability restriction to light work for both injuries (one-half apportioned to each injury). Under the "Wilkinson doctrine" the employee would get a combined disability rating for both injuries of light work, which is a 50% standard. If the "Wilkinson doctrine" was not applied, the employee would receive two 25% standard disability awards resulting in less money because the disability money chart is graduated.

However, if there is no common part of body becoming permanent and stationary at the same time, the injuries cannot be combined. In *Parker v. WCAB, 57 CCC 608,* the Court of Appeal affirmed the Board's refusal to combine two separate injuries, one to the left knee and one to the right knee, even though both injuries became permanent and stationary at the same time. The *Parker* case followed the *Norton* rationale that there must be one common part of body that becomes permanent and stationary at the same time in order to combine injuries.

In the case of *Department of Corporations v. WCAB (Daniell), 61 CCC 1469,* a Workers' Compensation Judge combined four injuries to give a 100 percent disability where the injuries did not have a common part of the body and did not become permanent and stationary on the same date. The judge reasoned that *Wilkinson* applied only to situations where there was the same employer and the same parts of the body, becoming permanent and stationary at the same time. In the opinion of the judge the first two requirements: (1) that of the same employer and (2) the same parts of the body, had been eliminated. The judge ruled that where you have the same employer and no non-industrial components, *Wilkinson* should apply. The Board denied reconsideration and the writ was denied. However, in the case of *Bloom v. WCAB, 63 CCC 429* , a judge issued separate findings and awards on a specific injury to the right upper extremity and a continuing trauma injury to the left upper extremity. The employee petitioned for reconsideration, stating that while the injuries did not become permanent and stationary at the same time, they occurred for the same employer and he argued that the rationale in *Daniell* applied. The WCAB denied reconsideration and indicated it was not bound by *Daniell* because it was a writ denied case and, in fact, disagreed with *Daniell.* Citing *Wilkinson* and *Parker,* the Board indicated that they still require successive injuries to the same part of body to become permanent and stationary at the same time before combining the injuries for rating purposes.

Based on an analysis of the last two writ denied cases, it can be concluded that *Norton* is still the law. Therefore, to combine injuries you must have one common part of body that becomes permanent and stationary at the same time, otherwise separate awards must issue.

If there is a prior permanent and stationary rating in one of the cases, the *Wilkinson* rule still can be applied if the Board has jurisdiction to reopen the old case and it is determined that, despite the permanent and stationary finding, the condition did not become permanent and stationary until after the successive injury *(Harrold v. WCAB, 45 CCC 77).* In this situation a credit will be allowed for the amount of permanent disability awarded, but the injuries will be combined. If the Board does not have jurisdiction to reopen the old case because it is more than five years from the date of injury, then they cannot be combined under the *Wilkinson* doctrine. In addition to a petition to reopen, the facts must show that, despite the earlier permanent and stationary finding, the employee's condition was not, in fact, permanent and stationary, but became permanent and stationary after the later injury.

When a consolidated rating is prepared under *Wilkinson,* both the age and compensation rate of the employee as of the time of the latest injury will be used, even though they were different at the time of the early injury or injuries *(Nuelle v. WCAB, 44 CCC 439).*

When combining disabilities under *Wilkinson* , the occupation that gives the highest rating among the injuries is used (*United Airlines v. WCAB [Hornbaker], 50 CCC 457).*

USING THE MULTIPLE DISABILITIES TABLE

When there is one injury causing disability to multiple body parts, duplication must be taken into account before applying the MDT. The MDT is used because one injury cannot produce a disability greater than 100 percent and because the MDT combines disabilities to avoid pyramiding. The MDT is found at the back of the Schedule For Rating Permanent Disabilities, April 1997, starting at page 7-15. It is a formula used by the disability evaluator set out in tabular form. It is a table of values generated by a formula where H stands for the higher disability rating after adjustment for age and occupation and L stands for the lower adjusted disability rating. The formula is as follows:

$[(100 - H)/100] \times L + H + (.1 \times L)$ = Combined Disability Percentage.

The result obtained by the calculation is not necessarily to be adopted as the final rating for the combined disabilities, but should only serve as a guide. The final rating will result after considering the entire picture of disability and the employee's diminished ability to compete in the open labor market (Schedule For Rating Permanent Disabilities, April 1997, page 7-12).

CONCLUSION

Apportionment, overlap, and duplication are difficult concepts. The opinions herein are those of the author, and not those of the Workers' Compensation Appeals Board. It is suggested that the cases be read and analyzed by the reader.